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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PARAMOUNT PICTURES CORPORATION; COLUMBIA PICTURES INDUSTRIES, INC.; TRI-STAR PICTURES, INC.; TWENTIETH CENTURY FOX FILM CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; MGM/UA DISTRIBUTION COMPANY; ORION PICTURES DISTRIBUTION CORPORATION; ORION CLASSICS, a division of Orion Pictures Corporation; and BUENA VISTA DISTRIBUTION; CO., INC.,

Petitioners,

vs.

THE MOVIE 1 & 2, a general partnership,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court exercise its power to resolve a conflict between the Circuits as to whether a defendant in an antitrust case is entitled to summary judgment when all of the evidence of an alleged conspiracy is circumstantial and equally consistent with the defendant's explanation of business justifications for unilateral action?

2. Is a group boycott *per se* illegal only when used in support of conduct that is itself unlawful *per se*?

RULE 29.1 STATEMENT AND LIST OF PARTIES

RESPONDENT, PLAINTIFF AND APPELLANT

THE MOVIE 1 & 2, a general partnership

PETITIONERS, DEFENDANTS AND APPELLEES

PARAMOUNT PICTURES CORPORATION;
Parent: Paramount Communications Inc.
Non-wholly Owned Subsidiaries: None

COLUMBIA PICTURES INDUSTRIES, INC.;
Parent: Columbia Pictures Entertainment, Inc.
Non-wholly Owned Subsidiaries: None

TRI-STAR PICTURES, INC.;
Parent: Columbia Pictures Entertainment, Inc.
Non-wholly Owned Subsidiaries: None

TWENTIETH CENTURY FOX FILM CORPORATION;
Parent: Fox Inc.
Non-wholly Owned Subsidiaries: None

UNIVERSAL FILM EXCHANGES, INC.;
Parent: MCA, Inc.
Non-wholly Owned Subsidiaries: None

MGM/UA DISTRIBUTION COMPANY;
Parent: MGM/UA Distribution Company is a joint venture of MGM/UA, Inc. and Metro/United Distribution, Inc., which are both wholly owned subsidiaries of MGM-Pathe Communications Co.
Non-wholly Owned Subsidiaries: None

RULE 29.1 STATEMENT AND LIST OF PARTIES
(continued)

ORION PICTURES DISTRIBUTION CORPORATION;
Parent: Orion Pictures Corporation
Non-wholly Owned Subsidiaries: None

ORION CLASSICS, a division of Orion Pictures Corporation;
Parent: Metromedia Company
Non-wholly Owned Subsidiaries: None

BUENA VISTA DISTRIBUTION CO., INC.,
Parent: The Walt Disney Company
Non-wholly Owned Subsidiaries: None

DEFENDANT AND APPELLEE (NOT JOINING IN THIS PETITION)

UNITED ARTISTS COMMUNICATIONS, INC.

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IN THE

United States Supreme Court

October Term, 1990

PARAMOUNT PICTURES CORPORATION; COLUMBIA PICTURES INDUSTRIES, INC.; TRI-STAR PICTURES, INC.; TWENTIETH CENTURY FOX FILM CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; MGM/UA DISTRIBUTION COMPANY; ORION PICTURES DISTRIBUTION CORPORATION; ORION CLASSICS, a division of Orion Pictures Corporation; and BUENA VISTA DISTRIBUTION CO., INC.,
Petitioners,

vs.

THE MOVIE 1 & 2, a general partnership,
Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, as amended, reversing summary judgment is reported at 909 F.2d 1245 (9th Cir. 1990), and is reprinted in Appendix A, p. A-1. The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc* on March 14, 1991, and that order is reprinted in Appendix B, p. B-1. The opinion of the District Court granting summary judgment and dismissing state claims is reported at 681 F. Supp. 654 (N.D. Cal. 1987), and is reprinted in Appendix C, p. C-1.

JURISDICTIONAL STATEMENT

The Ninth Circuit's opinion was filed on May 14, 1990, and amended on July 25, 1990. On March 14, 1991, the Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc*. Jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

STATEMENT OF THE CASE

This is an antitrust suit by an exhibitor of motion pictures against two competing exhibitors and 19 distributors of motion pictures.[1] The case arises under the Sherman Act, 15 U.S.C. § 1, with federal question jurisdiction under 15 U.S.C. § 15. After discovery closed, the district court granted summary judgment in favor of all defendants on all antitrust claims. The Ninth Circuit reversed and remanded the case for trial.

The respondent alleges that the two defendant exhibitors, the Nickelodeon and United Artists Communications Inc., entered into a "split agreement," by which the Nickelodeon would show "art" films and not compete with United Artists to license commercial films in the Santa Cruz, California area, while United Artists would show "commercial" films

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1. One of the original exhibitor defendants and 10 of the original distributor defendants have been dismissed from the action.

but not compete with the Nickelodeon to license "art" films in that market. Each of the Distributor Petitioners allegedly supported this split agreement by refusing to license first-run films to the respondent. There is no allegation, however, that the distributors conspired with one another, nor has respondent explained the motive for Distributor Petitioners to participate in an alleged conspiracy the purpose of which would be to *lower* the film rentals paid by the conspiring exhibitors.[2] The evidence linking each of the Distributor Petitioners to this split is entirely circumstantial. 909 F.2d at 1252, Appendix A, p. A-15.[3]

A split agreement is an "exhibitor agreement" not to compete in the licensing of films from distributors. *Id.* at 1248, Appendix A, p. A-8; *United States v. Capitol Service, Inc.*, 756 F.2d 502, 507 (7th Cir.), *cert. denied*, 474 U.S. 945 (1985). The "direct and intended" purpose of a split is to depress film rentals to distributors, eliminate guarantees to those distributors, or otherwise affect the terms of licensing for films. *Exhibitors' Serv., Inc. v. American Multi-Cinema*, 788 F.2d 574, 579 (9th Cir. 1986); *Capitol Service*, 756 F.2d

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2. As to the exhibitor defendants, the suit also alleges attempt to monopolize, conspiracy to monopolize, and monopolization of the Santa Cruz film exhibition market, in violation of 15 U.S.C. § 2. Since those claims do not involve the Distributor Petitioners we do not address such claims in this Petition.

3. There is disputed evidence that an employee of one of the Distributor Petitioners, Twentieth Century Fox, was *aware* of a split in Santa Cruz before the respondent entered the market. There is no evidence, however, that Fox ever refused to negotiate with the respondent, or participated in the alleged split. Furthermore, the statements "seem to apply only to appellees Fox and the exhibitors," and have not been held admissible against the other Distributor Petitioners. 909 F.2d at 1249-50, Appendix A, p. A-11.

at 504; *General Cinema Corp. v. Buena Vista Distribution Co.*, 532 F. Supp. 1244, 1254 (C.D. Cal. 1982).

The respondent theatre occupies "a converted storefront which it shares with a moped shop" in Santa Cruz, California. 909 F.2d at 1247, Appendix A, p. A-7. There are four exhibitors in the Santa Cruz market: respondent, United Artists, the Nickelodeon, and Scotts Valley.[4] The Nickelodeon exhibits primarily "art" films, both first-run and vintage. United Artists and Scotts Valley exhibit primarily first-run films that are more "commercial" in nature. The respondent's alleged intent, however, "was to exhibit both 'commercial' and 'art' films on a first run basis." *Ibid.*

The respondent progressed through four booking agents, trying to license first-run films for its new theatre. The distributors who visited the theatre, however, found the converted storefront/moped shop undesirable for first-run films, and continued to prefer the existing Nickelodeon and United Artists theatres. Respondent has exhibited primarily second-run films, with occasional first-run exhibitions, which it attributes to an alleged conspiracy. The Ninth Circuit panel acknowledged, however, that:

> [The Distributor Petitioners] presented evidence to the trial court from which a trier of fact could find that the decision to license films to UA and the Nickelodeon rather than to The Movie was based on such factors as the perceived inferiority and consequently lower grossing potential of The Movie's theatre house and the allegedly inferior terms offered in The Movie's bids. *Thus . . . the*

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4. Scotts Valley is not a party to this action, nor is it alleged that Scotts Valley was a member or victim of any conspiracy.

> *defendants rebutted the allegations of conspiracy.*

Id. at 1251, Appendix A, p. A-14 (emphasis added).

The respondent has not alleged any motive for the Distributor Petitioners to engage in the alleged conspiracy to split films which, if it actually existed, could only harm them.[5] The respondent has abandoned its claim that there was any effect upon competition. It admits that neither the quality nor quantity of films being released in Santa Cruz has been affected, and that the alleged conspiracy has not affected prices charged to consumers. *Id.* at 1255, Appendix A, p. A-23.

In the face of a reasonable justification for the Distributor Petitioners' conduct and the absence of any motive for them to participate in the alleged conspiracy, the Ninth Circuit nonetheless found the following evidence sufficient to preclude summary judgment:

> A. The Ninth Circuit panel examined summaries of bids submitted by respondent and found that "[w]hile it could be argued . . . that none of the [respondent's] bids were superior," that was an issue of fact, and that "[s]ome of the bids were arguably superior." *Id.* at 1251, Appendix A, p. A-15.
>
> B. There was evidence before the trial court indicating that some distributors, but not the Distributor Petitioners, had refused to receive

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5. "The suppression of competition in bidding for films injure[s] the film suppliers, who presumably suffer[] lower bids as a result of the split." P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 340.1a, at p. 401 (Supp. 1990).

> bids from respondent until they received threatening correspondence from the respondent's attorney.[6] *Ibid.*
>
> C. There was circumstantial "evidence before the trial court of awards of films without any bids at all, bid negotiations excluding [respondent], bid-tipping, adjustments to licensing agreements made to UA regularly, but to [respondent] rarely, if ever, and the statistics of film licenses awarded." *Id.* at 1252, Appendix A, p. A-16.

The Ninth Circuit panel found that since there were competing inferences from the above circumstantial evidence, consistent with both conspiracy and independent action, the respondent should be allowed to proceed to trial against the Distributor Petitioners.

I
THE CIRCUITS ARE SPLIT AS TO WHETHER AN INFERENCE OF ANTITRUST CONSPIRACY IS PERMISSIBLE BASED ON CIRCUMSTANTIAL EVIDENCE THAT IS EQUALLY CONSISTENT WITH UNILATERAL ACTIVITY AND CONCERTED ACTION

The Ninth Circuit panel in this case has turned back the antitrust clock 30 years by denying summary judgment on the basis of *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), without even mentioning *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986),

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6. The evidence of record shows that none of the Distributor Petitioners refused to accept the respondents' bids. Only some of the smaller distributors, known as Group II, and now dismissed, did so.

or *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). The court apparently failed to recognize that if *Poller* ever stood for the proposition that summary disposition is disfavored in an antitrust case, *Matsushita* now precludes that interpretation. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986); DeSanti & Kovacic, *Matsushita: Its Construction and Application By the Lower Courts*, 59 ANTITRUST L.J. 609, 609 (1991) (hereinafter "DeSanti & Kovacic").

In *Matsushita*, this Court noted that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," and stressed that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 475 U.S. at 588. Further, this Court stated that "[l]ack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence; if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." 475 U.S. at 596-97.

Ninth Circuit decisions in *Movie 1 & 2* and other cases diverge from the interpretation of *Matsushita* adopted by most, if not all, of the other circuits, which hold that judgment must be entered for the defendant if circumstantial evidence is equally consistent with inferences of concerted action and unilateral conduct. In the Ninth Circuit, however, even if the defendant comes forward with an independent business justification for its challenged conduct, the court will still find a genuine issue of fact sufficient to deny summary judgment if the plaintiff comes forward with evidence "capable of sustaining a reasonable inference that the defendant was not acting lawfully." *E.g., Hahn v. Oregon Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988), *cert.*

denied, 110 S. Ct. 140 (1989); DeSanti & Kovacic, at 627 n.97 (collecting cases).

This Ninth Circuit standard conflicts with *Matsushita*. In a recent law review article discussing *Matsushita*, the authors stated:

> The Ninth Circuit approach seems designed to establish precisely the type of evidence that *Matsushita* deemed insufficient: evidence as consistent with competition as with conspiracy. If the defendant first provides a plausible business justification and the plaintiff responds with evidence to support a reasonable inference that the defendant was not 'acting lawfully,' the evidence may be equally consistent with competition as with conspiracy.

DeSanti & Kovacic, at 627.

One Ninth Circuit panel has recently grafted another hurdle onto *Matsushita* by refusing to grant summary judgment even if inferences of conspiracy and of independent action are equally plausible from circumstantial evidence, unless there is a likelihood that allowing an inference of concerted action would deter "significant procompetitive conduct." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 906 F.2d 432, 440 (9th Cir. 1990).

Cases from other circuits demonstrate that the Ninth Circuit stands alone in allowing an inference of concerted action even though the evidence is consistent with unilateral action. The decision of the Third Circuit in *Houser v. Fox Theatres Management Corp.*, 845 F.2d 1225 (3d Cir. 1988), arises from an almost identical procedural and factual base as the case at bar. The plaintiff in that case alleged that the film

distributors had conspired with the exhibitor Fox Theatre Management[7] to deny first-run films to them, and claimed that their theatre was superior to the Fox theatres. *Id.* at 1232. Relying upon *Matsushita*, the Third Circuit affirmed summary judgment for the defendants, stating:

> [C]ourts have consistently recognized that motion picture distributors have broad discretion to make licensing decisions based on their own independent judgments. . . . *In light of the broad discretion that must be given to film distributors in making complex licensing decisions*, we hold that there is not enough evidence in this record to permit a factfinder to conclude that the distributor defendants acted contrary to their economic interests by licensing films to Fox rather than the Housers.

845 F.2d at 1232-33 (emphasis added). The Court in *Movie 1 & 2* held just the opposite:

> While it could be argued, as appellees also urge here, that none of the appellant's bids were superior, that determination is an issue of fact which should be decided by summary judgment only if the trial court can find that no reasonable jury could find on that question in favor of the non-moving party.

Movie 1 & 2, 909 F.2d at 1251. This standard turns *Matsushita* on its head by discounting the business justification that the Distributor Petitioners have given in this case. If the Ninth Circuit's interpretation were the standard,

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7. There is no relationship between Fox Theatre Management and either the Fox Broadcasting Network or Twentieth Century Fox Film Corporation.

then summary judgment would be impossible in an antitrust case.

Given the broad discretion[8] afforded licensing decisions, no inference of conspiracy should be drawn unless the complaining theatre's bids are so clearly superior on their face that no reasonable person could conclude otherwise.[9] Professors Areeda and Hovenkamp, in commenting upon *Houser* and similar cases, note that no conspiracy is needed to explain the continual grant of film licenses to particular theatres when, as in this case, "there are good reasons for each distributor unilaterally to prefer" those theatres over others. Areeda & Hovenkamp, ¶ 1413' at p. 907.

The Third Circuit also concluded that "the Housers failed to show that the distributor defendants had a motive to

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8. This Court has recognized that "[t]he distributor's judgment of the character and integrity of a particular exhibitor might result in acceptance of a lower bid than others offered." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 163 (1948). Indeed, the Ninth Circuit itself has recognized that a distributor can "license the film to more than one theatre in the area; it can award the film to a particular theatre with which it has an ongoing relationship; or it can let them all bid for exclusive exhibition rights." *United States v. Syufy Enters.*, 903 F.2d 659, 662 n.1 (9th Cir. 1990).

9. *See Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, 501-02 (5th Cir. Unit B 1982); *Lamb's Patio Theatre, Inc. v. Universal Film Exchs., Inc.*, 582 F.2d 1068, 1070 n.2 (7th Cir. 1978); *Brown v. Western Massachusetts Theatres, Inc.*, 288 F.2d 302, 304 (1st Cir. 1961) ("a departure from competitive bidding does not in itself constitute or prove a[n antitrust] violation"); *Balmoral Cinema, Inc. v. Buena Vista Distribution Co.*, 673 F. Supp. 219, 223 (W.D. Tenn. 1987), *aff'd*, 885 F.2d 313 (6th Cir. 1989); *Universal Amusements Co. v. General Cinema Corp.*, 635 F. Supp. 1505, 1514-15 (S.D. Tex. 1985) ("all distributors have very broad discretion in awarding their films").

conspire individually with Fox." *Houser*, 845 F.2d at 1233. The requirement of proof of motive is essential to be sure that the case makes economic sense, as required by *Matsushita*. As Professors Areeda and Hovenkamp note:

> [A] motivation to conspire is a necessary but not sufficient condition for inferring the existence of a conspiracy. The Supreme Court took the same position in its *Matsushita* decision, holding that no conspiracy may be inferred in the absence of a plausible motive to conspire.

Areeda & Hovenkamp, ¶ 1412' at p. 902 (footnotes omitted).[10]

The *Movie 1 & 2* panel opinion, however, does not discuss the need to prove motive. Respondent has made no attempt to show why it is in the interest of the motion picture distributors to engage in this alleged conspiracy. The allegations simply do not make any economic sense. Respondent is not a price cutter, so there was no reason to exclude it from the market. Indeed, it is conceded in this case that there is no actual effect upon competition -- no decrease in output, no effect upon consumers, no effect upon pricing at all. Respondent offers no plausible reason why the victims of alleged splitting, the distributors, would conceiv-

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10. Professors Areeda and Hovenkamp also note, "it would take rather strong evidence to show that the distributor joined such an agreement *so contrary to its interests*." Areeda & Hovenkamp ¶ 1509' at p. 981 (emphasis added). Professor Calkins also notes that "[c]ourts should hesitate before condemning an [alleged split] arrangement that, if illegal, would work to the [distributor's] disadvantage." Calkins, *The October 1989 Supreme Court Term and Antitrust: Power, Access, and Legitimacy*, 59 ANTITRUST L.J. 339, 353 (1991).

ably refuse to license to a suitably appointed theatre offering superior terms.

As noted above, other circuits hold that judgment must be entered for the defendant if circumstantial evidence is equally consistent with inferences of concerted action and unilateral conduct. For example, in *Nurse Midwifery Associates v. Hibbett*, 918 F.2d 605 (6th Cir. 1990), *modified*, 1991 Westlaw 35019 (6th Cir. March 12, 1991), the Sixth Circuit affirmed summary judgment for a physician and hospital that allegedly conspired to deprive plaintiff nurse midwives of staff privileges. The court noted that the plaintiffs produced circumstantial evidence of an illegal conspiracy but that the evidence was equally consistent with the hypothesis that the hospital denied the plaintiffs' applications for independent business reasons. 918 F.2d at 617. *See also Riverview Invs., Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir.) (independent interests of alleged conspirators gave them the motive unilaterally to deny request of shopping center developer for industrial revenue bonds), *cert. denied*, 111 S. Ct. 151 (1990).

Similarly, in *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167 (7th Cir. 1990), a broker for buyers of real estate alleged a conspiracy by sellers' brokers to drive it out of business. The court held that evidence of informal communications among several parties did not unambiguously support an inference of a conspiracy, and evidence of hostility appeared as likely as not to be isolated incidents or merely sales hype. *Id.* at 1172-73. Further, the defendants had legitimate business reasons for informing all brokers of their policies with respect to buyers' brokers. *Id.* at 1173. Therefore, the plaintiff failed to set forth evidence tending to exclude the possibility that defendants acted independently.

Another good example is provided by *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989), in which the Fourth Circuit affirmed summary judgment for the defendant, a manufacturer of furniture. In response to complaints by dealers about other dealers that sold at discount, the defendant prohibited its dealers from soliciting or selling its furniture by mail or telephone order to consumers residing outside specified sales areas. In holding that plaintiff's evidence of conspiracy was insufficient, the court asserted that some courts have "in effect misconstrued 'tends to exclude the possibility' of independent conduct . . . to mean something like 'arguably consistent with the possibility of a conspiracy.'" *Id.* at 806 n.4.

The Second, Fifth, Eighth, Tenth, and Eleventh Circuits have similarly held that no concerted action can be found if the evidence is equally consistent with concerted action and unilateral activity. *See In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990) ("pricing activity of the packers was 'as consistent with permissible competition as with illegal conspiracy'"); *H.L. Hayden Co. v. Siemens Medical Sys.*, 879 F.2d 1005, 1016 (2d Cir. 1989) (evidence that is as consistent with permissible competition as with illegal conspiracy is insufficient, "for a determination of an illegal section one conspiracy cannot be based upon speculation"); *Winn v. Edna Hibel Corp.*, 858 F.2d 1517, 1520 (11th Cir. 1988) (although alleged "conspiracy was a reasonable one," plaintiff failed to exclude possibility of independent action); *Health Care Equalization Comm. v. Iowa Medical Soc'y*, 851 F.2d 1020, 1032 (8th Cir. 1988) (affirming summary judgment for defendant because "an inference of conspiracy is no more reasonable than an inference that [defendant] was not a part of any concerted activity to boycott chiropractors"); *Key Fin. Planning Corp.*

v. ITT Life Ins. Corp., 828 F.2d 635 (10th Cir. 1987) (summary judgment for defendants affirmed where evidence was "at least as consistent with the permissible independent interests of the defendants" as with illegal concerted action).

The Ninth Circuit, therefore, stands alone among the circuits in its reading of *Matsushita*. This Court should exercise its supervisory power to resolve this conflict and confirm that a defendant in an antitrust case is entitled to summary judgment when all of the evidence of an alleged conspiracy is circumstantial and equally consistent with the defendant's explanation of business justifications for unilateral action.

II

THE SEVENTH AND NINTH CIRCUITS ARE SPLIT AS TO WHETHER A GROUP BOYCOTT IS A *PER SE* VIOLATION ONLY IF USED TO ENFORCE AN AGREEMENT THAT IS ITSELF ILLEGAL *PER SE*

The circuit courts have long grappled with the problem of determining whether group boycotts are *per se* illegal or to be judged by the rule of reason. The Ninth and Seventh circuits represent the polar extremes on this issue. In this case the Ninth Circuit has held an alleged group boycott to be *per se* illegal, even though it is conceded that no injury to competition has occurred. The Seventh Circuit has, however, dispensed with the *per se* rule for group boycotts, and holds concerted action to be illegal *per se* only when it is used in support of action that is itself unlawful *per se*. Petitioners urge this Court to adopt the Seventh Circuit's formulation.

The most recent Seventh Circuit case is *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473 (7th Cir.), *cert. denied*, 488 U.S. 852 (1988), in which the defendant APL, an association of pathologists, agreed with St. John's Hospital to provide complete pathology services. The district court

granted summary judgment for the defendants, and the Seventh Circuit affirmed. With respect to plaintiff's group boycott claim, the appellate court stated:

> Thus under the law of this Circuit, even if the individual members of APL combined in a horizontal group boycott to exclude Dr. Collins from practice at St. John's [Hospital], the boycott would be illegal per se only if the agreement the individual members . . . combined to enforce was itself illegal per se.

Id. at 479. The Seventh Circuit concluded that the district court correctly applied the rule of reason, because "the agreement the alleged boycott was used to enforce was not illegal, much less illegal per se." *Id.* at 480.

The Seventh Circuit has used the same analysis of group boycotts in other cases. In *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985), the plaintiff, which transported new Fords, alleged that Ford and other carriers conspired to destroy it. The district court dismissed for failure to state a claim. The Seventh Circuit affirmed, noting that the plaintiff had only alleged *per se* violations. As to the group boycott claim, the court stated:

> It is well settled in this circuit that 'group boycotts' are considered a per se violation only if they are used to enforce agreements that are themselves illegal per se. . . . The complaint fails to suggest in any way that the object of the alleged conspiracy constituted a price-fixing scheme, a tying arrangement, or a market allocation.

745 F.2d at 1109 (citations omitted). *See also Wilk v. American Medical Ass'n*, 719 F.2d 207, 221 (7th Cir. 1983)

("This court has recently recognized . . . 'that boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se -- for example price-fixing agreements.'"), *cert. denied*, 467 U.S. 1210 (1984).

The Seventh Circuit's approach is consistent with *FTC v. Superior Court Trial Lawyers Ass'n*, ___ U.S. ___, 110 S. Ct. 768 (1990), in which this Court held that a group boycott was *per se* illegal because it was used to enforce a price-fixing agreement, which was itself *per se* illegal. In dissent, Mr. Justice Brennan cited several cases in which this Court applied the rule of reason to alleged group boycotts. In distinguishing those cases, the majority delineated when *per se* condemnation is appropriate:

> In response to the dissent, and particularly to its observation that some concerted arrangements that might be characterized as 'group boycotts' may not merit *per se* condemnation, . . . we emphasize that this case involves not only a boycott but also a horizontal price-fixing arrangement -- a type of conspiracy that has been consistently analyzed as a *per se* violation for many decades. *All of the 'group boycott' cases cited in the dissent's footnote involved nonprice restraints.*

110 S. Ct. at 782 n.19 (emphasis added).

In contrast, the Ninth Circuit in this case held that the *per se* rule should apply, even though there is no other conduct for which the Distributor Defendants could be liable *per se*. There is no price-fixing component here. Respondent has conceded that there is no impact on output, and that pricing to the consumer has not been affected. All allegations that

would show injury to interbrand competition have been abandoned.[11]

It is apparent that the lower courts, including the Ninth Circuit in this case, continue to be confused over the appropriate standard to use when examining alleged boycotts. "[T]he distinction between boycotts that are [unlawful per se] and those that must be tested under the rule of reason is less than crystal clear." *Bhan v. NME Hospitals., Inc.*, No. 87-2727, 1991 Westlaw 38205 (9th Cir. March 25, 1991). The case at bar presents this Court with the opportunity to confirm that the approach of the Seventh Circuit is the appropriate theoretical framework for determining which boycotts are *per se* illegal, and which are not.

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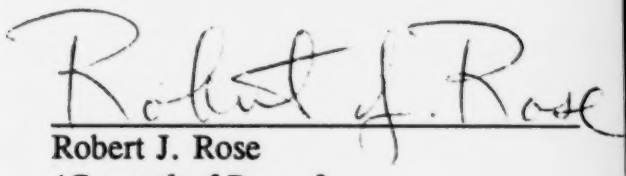
11. The *per se* illegality of a split agreement when suit is brought by distributors or the government, Areeda & Hovenkamp, ¶ 310' at 289-90, has no application in this case. A split agreement is *per se* illegal because of the harm it can cause to distributors, not to other exhibitors. "The market division agreement among the exhibitors is clearly unlawful, although it would not harm the plaintiff exhibitor which can bid for films with less competition from its rivals." Areeda & Hovenkamp, ¶ 1509' at pp. 980-81.

III. CONCLUSION

For the reasons noted above, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

April 16, 1991

Respectfully submitted,



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APPENDIX A

Order and Amended Opinion of the
United States Court of Appeals for the Ninth Circuit in
Movie 1 & 2 v. United Artists Communications
Reported at 909 F.2d 1245 (9th Cir. 1990)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE MOVIE 1 & 2, a general partnership,

Plaintiff-Appellant,

v.

UNITED ARTISTS COMMUNICATIONS, INC.; PARAMOUNT PICTURES CORPORATION; COLUMBIA PICTURES INDUSTRIES, INC.; TRI-STAR PICTURES, INC.; TWENTIETH CENTURY FOX FILM CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; MGM/UA DISTRIBUTION COMPANY; ORION PICTURES DISTRIBUTION CORPORATION; ORION CLASSICS, a division of Orion Pictures Corporation; and BUENA VISTA DISTRIBUTION CO., INC.,

Defendants-Appellees.

No. 88-1734

D.C. No. C 86-20390 RPA

ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Northern District of California
Robert P. Aguilar, District Judge, Presiding

Argued and Submitted
August 16, 1989—San Francisco, California

Filed May 14, 1990
Amended July 25, 1990

Before: Richard H. Chambers and Charles Wiggins, Circuit Judges, and Rudi M. Brewster*, District Judge.

*Hon. Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

Opinion by Judge Brewster

SUMMARY

Antitrust/Evidence

Reversing and remanding the district court's grant of summary judgment, the court of appeals held that in evaluating unreasonable restraint of trade allegations, the illegal per se rule must be applied to split agreements.

This case involved allegations by appellant The Movie 1 & 2, a general partnership consisting of Harold Snyder and his two sons, David and Larry, that appellee motion picture exhibitors, United Artists Communications, Inc. and the Nickelodeon, entered into an illegal agreement in which appellees, 19 major film distributors, participated and that the exhibitors attempted to monopolize, conspired to monopolize, and did monopolize the film exhibition market in Santa Cruz, California. Appellant alleged that The Movie was unable to obtain licenses to first-run commercial or art films from the distributors who concertedly refused to deal with it. Appellant alleged that the distributors cooperated in an illegal split agreement between UA and Nickelodeon, whereby nearly all first-run commercial films were licensed to UA and nearly all first-run art films were licensed to the Nickelodeon. Appellant also alleged that the split agreement in this case was part of a boycott against The Movie, which had the purpose of eliminating it as a competitor, a restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1 (1982). Appellant alleged that UA maintained a monopoly on first-run commercial film exhibition and that the Nickelodeon maintained a monopoly on all first-run art film exhibition in violation of section 2 of the Sherman Act. The district court, after excluding several items of evidence that it deemed inadmissible, granted appellees' multiple motions for summary judgment as to all of the antitrust claims, and The Movie appealed.

[1] Hal and David Snyder both gave deposition testimony that Al Chiarrapotti, Twentieth Century Fox's employee in charge of licensing films to Santa Cruz exhibitors, had stated to them that he did not count theatre seats in Santa Cruz because there was a split of product between exhibitors there, so that Fox did not take bids there. [2] This evidence was excluded as inadmissible hearsay at trial, but the court held that the district court erred because this was an admission by a party opponent which is not treated as hearsay. [3] The trial court also excluded as evidence the deposition testimony of the Nickelodeon's owner, Bill Raney, in which Raney stated that during the 1970's there was a split agreement between UA and a previous Santa Cruz exhibitor to allocate films so that neither party competed against the other in bidding. [4] The court found that since appellant was attempting to demonstrate previous anti-competitive conduct by UA, this evidence may have been admissible under F. R. Evid. 404(b) to show proof of motive, opportunity, intent, plan, or knowledge.

[5] The distributors possessed an absolute right to refuse to license films to The Movie so long as their decisions were based upon independent business judgment. [6] However, there was evidence at trial indicating that these distributors had refused to even receive bids from The Movie until they received threatening correspondence from The Movie's attorney. The distributors cited no legitimate business justification for this refusal. [7] It is not necessary for a plaintiff to show an explicit agreement in support of a Sherman Act conspiracy. Concerted action may be inferred from circumstantial evidence of conduct and course of dealing.

[8] Appellant also presented evidence which raised a material issue of fact as to UA's participation in an agreement in restraint of trade. The Chiarrapotti and Raney statements, erroneously excluded, provided some evidence of UA's participation in a split agreement. Absence of any evidence that UA and Nickelodeon ever bid against each other as well as the

pattern evidence indicating that UA had 96.9 percent of the revenue from first-run commercial films and Nickelodeon had 69.9 percent of the first-run commercial art films provided further support of the illegal split agreement allegation. [9] To the extent that the district court held that a split agreement should be evaluated under the rule of reason because it constituted a non-price restraint of trade, the court erred. It should have applied the illegal per se rule. [10] In this case, the split agreement was allegedly employed to restrict entry of other exhibitors into the Santa Cruz market for any film. If so, such conduct would cause antitrust injury in the form of a boycott, a conspiracy in restraint of trade in violation of the Sherman Act.

[11] The record indicated not only that appellant presented specific facts to the trial court to support its section 1 claims against all appellees, but also it appeared that there was sufficient evidence to support the section 2 monopoly claim against UA. The court reversed the grant of summary judgment and remanded the claims for trial.

COUNSEL

Ashley M. Winn, Santa Cruz, California, for the plaintiff-appellant.

Robert J. Rose, Bird, Marella, Boxes, Wolpert & Matz, Los Angeles, California, for Group I Distributors.

Stewart H. Foreman, Shartsis, Friese & Ginsburg, San Francisco, California, for Group II Distributors.

Joel Linzner, Khourie, Crew & Jaeger, San Francisco, California, for United Artists Communications, Inc.

Charles B. Cohler, Lasky, Haas, Cohler & Munter, San Francisco, California, for The Nickelodeon Corporation.

ORDER

The opinion in the above-referenced case, filed originally on May 14, 1990, hereby is amended as follows:

The last four sentences of the paragraph beginning at the bottom of page 4788 and concluding at the top of page 4789 of the slip opinion should be deleted. In their place, the following sentences are substituted into that paragraph:

> UA seems to have drawn this theory from this court's decision in *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), *cert. denied*, 109 S. Ct. 180 (1988), wherein we stated that "[s]ubstantial market power can persist only if there are significant and continuing barriers to entry." 838 F.2d at 366 (internal quotations omitted). UA argues that the relevant Santa Cruz market had no barriers to entry and that each film's distributor placed significant constraints on defendant's monopoly power. If borne out by the facts, this argument finds strong support in our recent decision in *United States v. Syufy Enters.*, No. 89-15475, slip op. at 4523 (6th Cir. May 9, 1990). In *Syufy*, we explained that the absence of entry barriers is always relevant to, and often determinative of, questions of monopoly power, because "[i]f there are no significant barriers to entry . . . any attempt to raise prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods and personal services for less." Slip op. at 4532. At this point in the litigation, however, UA's arguments do no more than clash with the evidence offered by appellant that UA and Nickelodeon successfully excluded potential competitors from the Santa Cruz market. In light of the conflicting evi-

dence on this issue, summary judgment was not appropriate.

OPINION

BREWSTER, District Judge:

The Movie 1 & 2 ("The Movie") appeals a district court judgment dismissing its case against numerous antitrust defendants. This case involves allegations that two motion picture exhibitors in Santa Cruz, California, entered into an illegal film licensing agreement in which 19 national film distributors participated, and that the exhibitors attempted to monopolize, conspired to monopolize, and did monopolize the film exhibition market in Santa Cruz. The United States District Court for the Northern District of California, excluding from evidence certain statements offered by The Movie that the court deemed inadmissible, granted the defendants' multiple motions for summary judgment as to all of the antitrust claims.

We reverse and remand as to all of the remaining defendants the district court's grant of summary judgment, finding that: (1) the court erred in excluding the appellant's proffered evidence; (2) a genuine issue of material fact exists as to whether the exhibitor United Artists Communications, Inc. ("UA") and the Group I distributors participated in an illegal split agreement in violation of section 1 of the Sherman Act, precluding summary judgment; and (3) a genuine issue of material fact exists as to whether the exhibitors attempted to monopolize, conspired to monopolize, or monopolized the Santa Cruz exhibition market in violation of section 2 of the Act, precluding summary judgment.

I. *BACKGROUND*

Appellant The Movie is a general partnership consisting of Harold Snyder and his two sons, David and Larry Snyder. In

February of 1984, the Snyders opened a motion picture theatre in Santa Cruz, California. The two-screen theatre, which has 225 seats in each auditorium, is located in downtown Santa Cruz in a converted storefront which it shares with a moped shop. The Snyders' intent was to exhibit both "commercial" and "art" films on a first-run basis.

The exhibitor defendants in this case were two of The Movie's competitors, UA, which operates five theatres in Santa Cruz with a total of twelve screens, and the Nickelodeon, which operates two theatres with a total of four screens. The distributor defendants included ten major motion picture distributors ("Group I") and nine smaller independent distribution companies ("Group II").[1]

The relevant geographic market in this case is the greater Santa Cruz area, which includes Aptos, Scotts Valley, and Capitola. The relevant product market is first-run motion pictures. Although theatres can either show "first-run" films or subsequently run "sub-run" films, first-run films provide the greatest grossing potential. The Santa Cruz area has only ten theatres at present. UA's five theatres exhibit primarily first-run "commercial" films. The Nickelodeon's two theatres exhibit primarily first-run and vintage "art" films.[2] The only other competitors in Santa Cruz are two non-defendant independent exhibitors who apparently show primarily sub-run films.

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[1]Since appellate oral argument, this court has dismissed The Nickelodeon, Warner Bros. Distributing Corporation, and all of the Group II distributor appellees from this case, pursuant to settlements among the parties.

[2]This circuit has recognized the existence of relevant submarkets within a product market. See *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 994 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), *cert. denied*, 479 U.S. 1034 (1987) (recognizing "industry anticipated top-grossing films" as a relevant market, distinct from the general film market). We are satisfied with the appellant's division of the relevant market in this case into two categories, "commercial" and "art" films.

The appellant alleges that The Movie was unable to obtain licenses to first-run commercial or art films from the defendant distributors, who concertedly refused to deal with it. Appellant alleges that the distributors cooperated in an illegal "split agreement" between UA and the Nickelodeon, whereby nearly all first-run commercial films were licensed to UA and nearly all first-run art films were licensed to the Nickelodeon. A split agreement is an exhibitor agreement which divides a normally competitive market by allocating films to particular members with the understanding that there will be no bidding among members for licensing rights to the films assigned. *Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc.*, 788 F.2d 574, 576 (9th Cir. 1986).

Appellant alleges that the split agreement in this case was part of a boycott against The Movie, which had the purpose of eliminating it as a competitor, a restraint of trade in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). Appellant also alleges that UA maintained a monopoly on first-run commercial film exhibition and that the Nickelodeon maintained a monopoly on first-run art film exhibition, in violation of section 2 of the Sherman Act, 15 U.S.C. § 2 (1982).

On December 22, 1987, the district court, after excluding several items of evidence which it deemed inadmissible, granted the defendants' multiple motions for summary judgment as to both the section 1 and section 2 claims and relinquished its jurisdiction of the pendent state claims.

II. *STANDARD OF REVIEW*

In reviewing a grant of summary judgment, our task is identical to that of the trial court. Viewing the evidence *de novo* in the light most favorable to the party against whom summary judgment was granted, we must determine whether the trial court correctly found that there was no genuine issue of material fact and that the moving party was entitled to

judgment as a matter of law. *Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341 (9th Cir. 1984). Our review of the trial court's rulings on the admissibility of evidence is plenary where the rulings call for the application of a legal standard, as opposed to a factual determination. *In re Japanese Electronic Products*, 723 F.2d 238, 257 (3rd Cir. 1982), *rev'd on other grounds*, 475 U.S. 574 (1986); *see also Whittaker*, 736 F.2d at 1347.

Summary judgment is disfavored in complex antitrust litigation. The Supreme Court, in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), stated:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Although *Pollar* does not preclude summary judgment in the proper antitrust case, it does advise caution. *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680 (9th Cir. 1985). Summary judgment is appropriate only in the clear absence of any significant probative evidence tending to support the complaint. *Three Movies of Tarzana v. Pacific Theatres, Inc.*, 828 F.2d 1395, 1398 (9th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

III. *DISCUSSION*

A. *THE TRIAL COURT'S EXCLUSION OF EVIDENCE*

1. *The Chiarrapotti Statements*

[1] The appellant argues that the trial court erred in excluding from evidence Hal and David Snyder's deposition testi-

mony of a statement purportedly made by Al Chiarrapotti, distributor Twentieth Century Fox's employee in charge of licensing films to Santa Cruz exhibitors. The Snyders both testified in substance that Chiarrapotti had stated to them that he did not count theatre seats in Santa Cruz because there was a split of product between exhibitors in Santa Cruz, so that Fox did not take bids there. The defendants filed a declaration of Al Chiarrapotti denying that he had made this statement. The trial court held that this evidence was "inadmissible and contradicted hearsay from a third person." *The Movie 1 & 2 v. United Artists Communications,* 681 F. Supp. 654, 658 (N.D. Cal. 1987).

First, appellees argue that the issue of the Chiarrapotti statements was not preserved for appeal since plaintiffs did not address defendants' explicit objections to admission of the statements either in their memorandum in opposition to the motions for summary judgment or in their oral argument at the summary judgment hearing. Appellees contend, therefore, that the correct standard for this particular question is plain error under Federal Rules of Evidence 103(d), due to appellant's failure to respond to appellee's objections to the evidence at the time it was excluded at trial. Appellees fail to note, however, that Rule 103(d) does not apply where, as here, the evidence was made known to the court.[3] Fed. R. Evid. 103(a)(2). Therefore, the correct standard for this court to apply is one of *de novo* review.

[2] Under the *de novo* standard, this court finds that the district court erred in excluding this statement as inadmissible hearsay, at least as to appellee distributor Fox. The statement, which was made by a former licensing agent for Fox, was an admission by a party opponent under Fed. R. Evid. 801(d)(2). Rule 801(d) states that an admission by a party opponent is

[3]Evidence of the Chiarrapotti statement was in the submitted deposition testimony of Harold Snyder at page 115, and the court's consideration of the statement is evidenced by its discussion in its opinion.

not to be treated as hearsay. Since, in deciding a summary judgment motion, all inferences are to be viewed in the light most favorable to the non-moving party, and since this evidence would likely have been admissible at trial, the court should have considered the statement in making its summary judgment determination.

Appellees next argue that the plaintiff failed to demonstrate that the statement qualified under Rule 801(d)(2)(D) as a statement by a party's servant concerning a matter within the scope of the employment, made during the existence of the relationship. The status of Mr. Chiarrapotti, however, was never in dispute. He was contacted by the Snyders because of his agency relationship, and the whole subject of their conversation concerned the possibility of doing business with appellee Fox, the principal of Mr. Chiarrapotti. There is no merit to appellee's position regarding the agency relationship of Mr. Chiarrapotti at the time of the alleged statements.

Furthermore, appellees argue that in order to admit the evidence against any defendant other than Mr. Chiarrapotti's employer, the statements must qualify under Fed. R. Evid. 801(d)(2)(E) as a statement by a co-conspirator made during the course and in furtherance of a conspiracy. The statements could be understood as supporting and furthering the split agreement. Since the statements, however, seem to apply only to appellees Fox and the exhibitors UA and Nickelodeon, this court concludes that the statements would be admissible, at least as to appellees Fox and UA. Such evidence of the split agreement would bear on both the section 1 and 2 claims of plaintiff.

2. *The Raney Statements*

[3] The appellant presented to the trial court the deposition testimony of the Nickelodeon's owner, Mr. Bill Raney, in which Raney stated that during the 1970's there was a split agreement between UA and a previous Santa Cruz exhibitor,

Kindair, to allocate films, so that neither party competed against the other in bidding. UA subsequently purchased Kindair's Santa Cruz theatres. The trial court excluded this evidence, stating: "Plaintiff has no standing to complain of this previous split which occurred before its entry onto the market and did not produce any antitrust injury to The Movie." *The Movie 1 & 2,* 681 F. Supp. at 658.

[4] The appellant, however, did not offer this evidence in an attempt to recover for antitrust injury resulting from the alleged split between UA and Kindair prior to The Movie's entry into the market. Rather, appellant was attempting to demonstrate previous anti-competitive conduct by defendant UA. Evidence of prior wrongs or acts may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" under Federal Rule of Evidence 404(b). *See also, Whittaker,* 736 F.2d at 1347.

At oral argument, appellant argued to the trial court that this testimony should be admitted to give an historical perspective of the anti-competitive atmosphere in the Santa Cruz exhibition market. The defendants objected to the testimony as hearsay, since it was based on statements allegedly made to Raney by Lou Lencioni, a UA employee. However, Lencioni's statements, like Chiarrapotti's, were statements by a party-opponent and, therefore, were not hearsay under the Federal Rules of Evidence. This testimony should have been considered by the trial court in deciding the motions for summary judgment.

Furthermore, appellees now argue that the testimony only evidences common legitimate business practices, with no suggestion of any illegal activity. Although Mr. Raney characterized the track system as a "split," appellees argue that he used the term in a generic sense, and his choice of words was not meant to bear any legal significance. Nevertheless, the statements were relevant and admissible. Appellee's argument

only addresses the weight to be given to them, which is a task for the jury.

B. *SECTION 1 CLAIMS: AGREEMENT IN RESTRAINT OF TRADE*

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1 (1982). Appellant's section 1 claims allege an illegal agreement between the exhibitors and the distributors in the form of a "group boycott" aimed at excluding The Movie from the Santa Cruz theatre market.

The Supreme Court has emphasized, however, that the Sherman Act does not restrict "the long recognized right of a trader . . . engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Because of a supplier's right to choose his customers and set his own terms, "antitrust plaintiffs are required to do more than merely allege conspiracy and unequal treatment in order to take a case to trial." *Harkins Amusement Enterprises v. General Cinema Corp.*, 850 F.2d 477, 483 (9th Cir. 1988), *cert. denied* 109 S.Ct. 817 (1989). According to the law of this circuit, once a defendant rebuts the allegations of conspiracy with "probative evidence supporting an alternative interpretation of a defendant's conduct," the plaintiff must come forward with specific factual support of its conspiracy allegations to avoid summary judgment. *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680 (9th Cir. 1985).

The defendants in this case did offer some evidence from which a trier of fact could reasonably have found that their refusal to deal with The Movie was based on legitimate and sound business judgment. Following such a showing of a plausible and justifiable reason for a defendant's conduct, a plaintiff must provide specific factual support for its allega-

tions of conspiracy which tends to show that the defendant was not acting independently. Accordingly, we examine appellant's evidence in support of its conspiracy allegations.

1. *The Distributor Defendants*

[5] The distributors possessed an absolute right to refuse to license films to The Movie as long as their decisions were based upon independent business judgment. *Colgate*, 250 U.S. at 307. The distributors presented evidence to the trial court from which a trier of fact could find that the decision to license films to UA and the Nickelodeon rather than to The Movie was based on such factors as the perceived inferiority and consequently lower grossing potential of The Movie's theatre house and the allegedly inferior terms offered in The Movie's bids. Thus, under *Barnes*, the defendants rebutted the allegations of conspiracy, and it was incumbent upon the plaintiff to come forward with specific factual support of its conspiracy claim. We believe the plaintiff did present ample evidence to rebut defendants' evidence of independent business decisions and to support plaintiff's allegations of an illegal boycott. We, therefore, reverse the trial court's summary adjudication of the section 1 claims against all of the Group I distributor defendants.

Appellees contend that the lower court's record contained no admissible evidence or assertion of any defendant distributors' having received *superior* bids from The Movies and having rejected them in favor of defendant exhibitors. Appellees fail to recollect the exhibits N-1 through N-16 to the declaration of Larry Snyder in opposition to defendants' various motions for summary judgment. While it could be argued, as appellees also urge here, that none of the appellant's bids were superior, that determination is an issue of fact which should be decided by summary judgment only if the trial court can find that no reasonable jury could find on that question in favor of the non-moving party. *See Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248 (1986). Some of the bids were arguably superior.[4]

[6] There was evidence before the trial court indicating that these distributors had refused to even receive bids from The Movie until they received threatening correspondence from The Movie's attorney. The distributors have cited no legitimate business justification for a refusal to even receive an exhibitor's bid, nor can this court conceive of how such conduct could reflect sound business judgment. To the contrary, such behavior raises the inference that the distributors would not have licensed films to The Movie even if presented with consistent lucrative bids superior to those of the other exhibitors. This circuit has recognized that a distributor's repeated rejection of lucrative bids in an anticompetitive market environment raises an inference of conspiratorial antitrust conduct. *See Harkins,* 850 F.2d at 484. The evidence that UA reaped roughly 96.9% of all revenues from first-run commercial films shown in Santa Cruz reflects an anticompetitive market situation. In such an environment, the distributors' refusal to even receive a new exhibitor's bids "tends to exclude the possibility of independent action," and at least raises an issue of fact as to their participation in the alleged boycott.

[7] This circuit has recognized that it is not necessary for a plaintiff to show an explicit agreement among defendants in support of a Sherman Act conspiracy, and that "concerted action may be inferred from circumstantial evidence of the defendant's conduct and course of dealings." *Harkins,* 850 F.2d at 477 (1988) (quoting *Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1479 (9th Cir. 1986). We conclude, therefore, that appellant did present sufficient evidence to present a triable issue on the section 1 claim of conspiracy to restrain trade in

[4]See, for example, Exhibits N-1, N-4, N-6, N-7, and N-12 to the deposition of Larry Snyder in opposition to defendants' motions for summary judgment.

the form of a group boycott of appellant through split agreements. Our conclusion is reached in the context of evidence before the trial court of awards of films without any bids at all, bid negotiations excluding appellant, bid-tipping, adjustments to licensing agreements made to UA regularly, but to appellant rarely, if ever, and the statistics of film licenses awarded. The appellant should, therefore, have been allowed to proceed to trial on the section 1 claims against the Group I distributors. We accordingly reverse the trial court's grant of summary judgment as to these defendants.

2. *Defendant Exhibitor United Artists*

[8] The appellant also presented evidence to the trial court which raises a material issue of fact as to UA's participation in an agreement in restraint of trade. The Chiarrapotti and Raney statements, which the court erroneously excluded, provided some evidence in support of the allegations of UA's participation in an illegal split agreement. The absence of any evidence that UA and the Nickelodeon ever bid against each other for a film during the relevant period, as well as the pattern evidence indicating that UA had 96.9% of the revenue from first-run commercial films which played in Santa Cruz during the relevant period while Nickelodeon had 69.9% of the revenue from first-run art films shown during that period, provided further evidence in support of the allegations of participation in an illegal split agreement.

Appellees first argue that it is impossible to classify types of films. They admit, however, that the exhibitors in this lawsuit did differ in the types of films they preferred to play: the Nickelodeon specializing in foreign and more sophisticated subject films, UATC and Scotts Valley playing mostly general audience films. Appellees' contention, however, that no "pattern" existed besides the independent, legitimate business, and artistic decisions of the exhibitors misses the point. The question is not whether an individual exhibitor has the "right" to specialize; it cannot be disputed that every exhibi-

tor has the right, and perhaps even laudable business acumen to "specialize" in one type of film, such as "art" or "commercial." The relevant inquiry, rather, is whether the defendant exhibitors conspired to exclude any and all other entrants into the movie exhibition market. For this, the statistical pattern evidence, along with other evidence, contributes to the raising of a material issue of fact.

Appellant further offered evidence of specific instances where UA advertised films prior to the completion of bidding, allegedly indicating confidence and ultimate knowledge that it would obtain the films. Although UA argues that it is a common practice in the film industry to obtain and display promotional posters for films that have not yet been licensed, UA offered no explanation for the evidence that, in addition to displaying posters, on at least one occasion it had placed an advertisement in a local newspaper advertising a film it had not yet been awarded.

Appellant also presented to the trial court a letter sent to Hal Snyder from The Movie's film buyer, documenting an instance where a non-defendant distributor had agreed to license a particular film to The Movie, assuring the film buyer that The Movie could have it because UA had shown no interest in the film in northern California. The distributor later informed The Movie that it was canceling its agreement in order to license the film to UA. This evidence suggests that UA wielded such power in the Santa Cruz market that a distributor would rather breach an agreement with The Movie than deny UA a film.

Viewing the above evidence and the inferences that may be drawn therefrom collectively and in the light most favorable to the appellant, we cannot say that there was an absence of any genuine issue of material fact. Therefore, UA was not entitled to prevail as a matter of law. The summary adjudication of the section 1 claims in favor of UA must be reversed.

3. *Evaluation of the Unreasonable Restraint of Trade Allegations Under the "Per Se" Rule or the "Rule of Reason"*

[9] To the extent that the district court held that a split agreement should be evaluated under the rule of reason because it constituted a non-price restraint of trade, the court erred. It should have applied the illegal *per se* rule.[5]

This circuit has recently ruled on this issue. In *Harkins*, 850 F.2d at 486, we noted that *per se* treatment is appropriate "where joint efforts by firms disadvantage competitors by inducing suppliers or customers to deny relationships the competitors need in order to compete." We concluded that an alleged split agreement, if proven, would be illegal *per se*. Appellees dispute the appellant's reliance on *Harkins* on several grounds. First, they claim that the "*per se* rule" in that case was only *dicta*. Second, they claim that all cases finding *per se* treatment appropriate for a split agreement have demonstrated that the agreement was to depress film rentals to the distributors, eliminate guarantees to those distributors, or otherwise affect the terms of licensing for films, i.e., antitrust injury. Appellees contend that appellants have failed to even allege these factors. One of the cases relied on in *Harkins*, appellees point out, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), supports the proposition that a *per se* analysis is not appropriate where no antitrust injury has been alleged. The United States Supreme Court in that case found that plaintiff failed to prove an antitrust violation when it demonstrated injury to itself

[5]Appellees contend that the district court referred to the rule of reason in mere *dicta* and, therefore, that the issue to which it referred cannot be the basis for a reversal. They argue that the district court never reached the question whether the rule of reason or the *per se* analysis should be used because both first require proof of an agreement, such as a split agreement, which the court failed to find. Since we find an issue of fact exists regarding the existence of a split agreement, we address the applicability of the "rule of reason" analysis.

but not to competition. *Northwest Wholesale Stationers,* 474 U.S. at 297 n.9.

[10] In the instant case, however, the split agreement is allegedly employed to restrict entry of other exhibitors into the Santa Cruz market for any film. If so, such conduct would cause antitrust injury in the form of a boycott, a conspiracy in restraint of trade in violation of 15 U.S.C. § 1. In fact, in *Northwest Wholesale Stationers,* 472 U.S. at 294, the court opined that in cases of group boycotts that directly or indirectly cut off necessary access to customers or suppliers, the *per se* rule applies because the likelihood of antitrust injury is clear.

On remand, the trial court should instruct the jury accordingly.

C. *SECTION 2 CLAIMS: MONOPOLIZATION*

The section 2 monopoly claims in this case were directed only against the exhibitor defendants. Appellant alleged that UA attempted to monopolize, and did monopolize, the first-run commercial film market in Santa Cruz. Appellant also alleged a conspiracy between the two exhibitors to monopolize the market. The district court granted the exhibitors' motions for summary judgment as to all of the section 2 claims. As defendant Nickelodeon has since been dismissed from the case, we review the court's decision as to defendant exhibitor UA only.

Appellees argue that appellant has abandoned its attempt and conspiracy claims by not addressing them in its opening brief. While it is true as a general principle that issues not briefed by an appellant will be deemed abandoned and not considered on appeal, in this case The Movie did not aban-

don the claims, but gave them sufficient, albeit brief, mention.[6]

1. *Monopolization and Attempt to Monopolize*

To establish monopolization under section 2 of the Sherman Act, a plaintiff must prove:

(1) possession of monopoly power in the relevant market;

(2) willful acquisition or maintenance of that power; and

(3) causal antitrust injury.

Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 993 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), *cert. denied*, 479 U.S. 1034 (1987).

To establish an attempt to monopolize, a plaintiff must prove:

(1) specific intent to control prices or destroy competition;

(2) predatory or anticompetitive conduct to accomplish the monopolization;

(3) dangerous probability of success; and

(4) causal antitrust injury.

Transamerica Computer Co., Inc. v. International Business Machines, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 995 (1983).

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[6]Opening Brief for Appellant at 47.

a. *Monopoly Power*

Appellee UA asserts that appellant has presented no direct evidence of UA's alleged monopoly power. However, the Supreme Court has acknowledged that the existence of monopoly power "ordinarily may be inferred from the predominant share of the market." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (finding that a market share of 87% could sustain a finding of monopoly power). This circuit has stated that, although market share does not alone determine monopoly power, market share is perhaps the most important factor to consider in determining the presence or absence of monopoly power. *Pacific Coast Agric. Export Ass'n. v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1204 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). Moreover, in that same case the court held that a market share as low as 45-70% may support a finding of monopoly power, if accompanied by other relevant factors. *Pacific Coast*, 526 F.2d at 1204. The appellant's showing that UA's gross revenues were as high as 96.9% of the first-run commercial film exhibition revenues in Santa Cruz, and that Nickelodeon's gross revenues were as high as 69.9% of the first-run art film exhibition revenues, at least raises an issue of fact as to the exhibitor UA's possession of monopoly power, particularly in light of the other evidence in the record of the exhibitors' power to exclude competition from the Santa Cruz market.

UA points out that market share alone does not definitively establish monopoly power. UA goes on to argue that its high market share could not possibly create an inference of monopoly power because of (1) the low barriers to entry into that market; and (2) the distributors' ability to control the licensing of their copyrighted films. UA seems to have drawn this theory from this court's decision in *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), *cert. denied*, 109 S. Ct. 180 (1988), wherein we stated that "[s]ubstantial market power can persist only if there are significant and continuing barriers to entry." 838 F.2d at 366

(internal quotations omitted). UA argues that the relevant Santa Cruz market had no barriers to entry and that each film's distributor placed significant constraints on defendant's monopoly power. If borne out by the facts, this argument finds strong support in our recent decision in *United States v. Syufy Enters.*, No. 89-15475, slip op. at 4523 (6th Cir. May 9, 1990). In *Syufy*, we explained that the absence of entry barriers is always relevant to, and often determinative of, questions of monopoly power, because "[i]f there are no significant barriers to entry . . . any attempt to raise prices above the competitive level will lure into the market new competitors able and willing to offer their commercial goods and personal services for less." Slip op. at 4532. At this point in the litigation, however, UA's arguments do no more than clash with the evidence offered by appellant that UA and Nickelodeon successfully excluded potential competitors from the Santa Cruz market. In light of the conflicting evidence on this issue, summary judgment was not appropriate.

b. ***Willful Acquisition or Maintenance of Power, Intent to Destroy Competition, Anticompetitive Conduct***

The previously discussed evidence of the split agreement and alleged attempt to boycott The Movie from the market raises a question of fact as to whether UA willfully acquired or maintained monopoly power by engaging in predatory or anticompetitive conduct designed to destroy competition. Appellees, on the other hand, argue that the mere semblance of a split agreement is not enough to raise a question of material fact; they claim that appellant's failure to introduce any evidence that UA or any of the distributor defendants had a conscious commitment to a common scheme to achieve an unlawful objective, i.e., to boycott The Movie, justified granting summary judgment. In other words, appellees contend that in addition to proving that UA had agreed with Nickelodeon to refrain from bidding against one another, to maintain their action, plaintiff also was required to show that UA

secured the cooperation of distributors in excluding plaintiff from the first run market.

Such is not the case. The showing of a possible split agreement is one piece of circumstantial evidence from which a jury may infer a willful acquisition or maintenance of monopoly power. Market share is another. The fact that UA acquired its prior competitor Kindair, thus eliminating its only serious competition in the market, is further evidence of anti-competitive conduct on the part of UA, albeit prior to the time of The Movie's entry into the market. Together, these pieces of evidence, particularly examined in the context of a highly anti-competitive environment, are sufficient to raise a material issue of fact as to whether UA willfully maintained monopoly power or engaged in anticompetitive conduct with the intent to destroy or discourage competition. While it may be true, as appellees contend, that the alleged discriminatory adjustments are common in the industry, and while it may also be true that appellant never presented evidence of monopolistic profits, the evidence discussed above suffices to raise a material issue of fact on this element of the section 2 claim.

c. ***Causal Antitrust Injury***

Appellees argue that appellant has failed to address the threshold issue of antitrust injury: injury to interbrand competition in the relevant market. Whereas appellant's original complaint contained allegations that the distributor appellees agreed to boycott appellant who was a "price cutter" so as to eliminate price competition, that consumers were forced to pay higher prices to attend theaters, and that the availability of films in Santa Cruz was reduced, appellant has since abandoned those claims. According to appellees, the appellant admitted in depositions of H. Snyder that the quality or quantity of films being released in Santa Cruz has experienced no change, and that pricing to the consumer has not been affected by any conduct of appellees.

We find, however, that appellant offered sufficient evidence from which a trier of fact could conclude that The Movie suffered causal antitrust injury as a result of the exhibitors' alleged wrongful conduct. Since, under *Harkins*, a split agreement, if proved, would be illegal *per se*, no further demonstration is required to prove an anticompetitive effect. *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 103-04 (1984). Although an anticompetitive effect is presumed, however, a plaintiff must still show that its injury was caused by anticompetitive acts. *Newman v. Universal Pictures*, 813 F.2d 1519, 1522-23 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 180 (1988). Appellant accomplished this by alleging that it was cut off from access to the film supply necessary to allow it to compete.

2. *Conspiracy to Monopolize*

The evidence discussed previously, which suggested the existence of a split agreement between UA and the Nickelodeon, acquiesced in by certain distributors, raises a question of fact as to whether UA engaged in concerted action in maintenance of its alleged monopoly power. Since such conduct, if proved, would violate section 2 of the Sherman Act, the trial court erred in granting the motion for summary judgment on the conspiracy claim.

IV. *CONCLUSION*

[11] The record indicates that the appellant presented specific facts to the trial court to support its section 1 claims against all appellees. It further appears that there was sufficient evidence in the record to support the section 2 claim against UA. We, therefore, reverse the district court's grant of summary judgment and remand these claims for trial.

REVERSED AND REMANDED.

APPENDIX B

Order of the
United States Court of Appeals for the Ninth Circuit
Denying Petitions for Rehearing and Rejecting Suggestions
of *En Banc* Consideration
(filed March 14, 1991)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 14 1991
CLERK, U.S. COURT OF APPEALS

THE MOVIE 1 & 2,
a general partnership,

Plaintiff-Appellant,

v.

UNITED ARTISTS
COMMUNICATIONS,
INC. et al.,

Defendants-Appellees.

No. 88-1734

D.C. No. CV-86-20390-RPA

ORDER

Before: CHAMBERS and WIGGINS, Circuit Judges, and BREWSTER,* District Judge.

The panel has voted to deny appellees' petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellees' petition for rehearing are denied and the suggestions for rehearing en banc are rejected.

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* Hon. Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX C

Opinion and Order
Granting Summary Judgment and Dismissing State Claims
United States District Court
Northern District of California
in
Movie 1 & 2 v. United Artists Communications
Reported at 681 F. Supp. 654 (N.D. Cal. 1987)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE MOVIE 1 & 2,
Plaintiff,
v.
UNITED ARTISTS COMMUNICATIONS, INC.; et al.,
Defendants

No. C 86-20390 RPA

681 F. Supp. 654

December 22, 1987, Decided, Filed and Entered

OPINION: ORDER GRANTING SUMMARY JUDGMENT AND DISMISSING STATE CLAIMS

AGUILAR, District Judge:

I. INTRODUCTION

Plaintiff, a Santa Cruz movie theatre, sued two competing motion picture exhibitors and nineteen film distributors alleging antitrust violations of the Sherman Act and pendent state claims. The defendants' simultaneously brought four separate summary judgment motions which came on for hearing December 11, 1987. The Court has received, read, and considered all papers submitted on the motions, and in addition, heard the argument of counsel. Good cause appearing therefor, the Court GRANTS the summary judgment motions on the first, second, and third claims for relief. Additionally, the Court dismisses jurisdiction over the fourth and fifth state law claims for the reasons set out below.

I. FACTUAL BACKGROUND

In February of 1984, Harold Snyder and his two sons, David and Larry Snyder opened The Movie 1 & 2, [The Movie] a two screen motion picture theatre with 225 seats in each auditorium, with the intent of exhibiting what are termed "commercial" and "art" pictures on a first run basis. The theater is located in downtown Santa Cruz, California, in a converted storefront it shares with a moped shop. It appears to be a nice, clean, medium sized theatre.

Santa Cruz has 9 theatres with 23 individual screens and two drive-in screens in addition to The Movie. Defendant United Artist Communications [UA] operates 5 theaters with a total of 11 screens which show first run movies.

Defendant Nickelodeon Inc. operates two theatres, one, the Nickelodeon, with 4 screens, plays mostly first run films, the other, the Sashmill, plays vintage movies. The owners of the Nickelodeon, William and Nancy Raney, have emphasized exhibition of "motion pictures with a more serious theme, motion pictures which [they] believe[] educate as well as entertain." The Nickelodeon is colloquially known as an art house for its choice of movies.

Scott's Valley theatre, a non-defendant in this suit, has 4 screens which play both first run and sub-run pictures. The drive-in theatre has 2 screens, although plaintiffs assert that by its nature, the drive-in does not compete with the "hard top" theatres.

The other defendants in this case are 10 major motion picture distributors classified as the Group I distributors, and the denominated Group II distributors of 9 independent

distribution companies.[1]

Distributors have sweeping discretion in licensing their movies. *Universal Amusements v. General Cinema*, 635 F.Supp. 1505, 1515-1517 (S.D. Tex. 1985). They take into consideration a myriad of factors, such as the percentage terms and guarantees offered, theatre quality, seating capacity, location and performance records. The distributors assert that the single most important factor in deciding how to license a picture is the perceived "grossing potential" of the theatres. Grossing potential is based upon a perception of the theatre's past grossing history on comparable motion pictures. They note that because new theatres have no grossing history, it is common practice for the new entrant to offer substantial guarantees in order to win pictures and develop a history.

Plaintiff brought this antitrust suit for damages and injunctive relief pursuant to § 4 of the Clayton Act (15 U.S.C. § 15) for violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1,2), and state law claims of unfair competition and interference with prospective advantage.

Plaintiffs allege that the two exhibitor defendants entered into an illegal split whereby UA monopolized the first run commercial film exhibition market and the Nickelodeon monopolized the first run art film exhibition by conspiring to

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1. Group I consists of Paramount Pictures Corporation; Warner Bros. Distributing Corporation; Columbia Pictures Industries, Inc; TriStar Pictures, Inc.; Twentieth Century Fox film Corporation; Universal Film Exchanges, Inc.; MGM/UA Distribution Company; Orion Pictures Distribution Corporation; Orion Classics; and Buena Vista Distribution Co. Group II consists of Cannon Releasing Corp.; New World Pictures, Ltd.; European Classics; Skouras Pictures; Kino International Corp.; Island Pictures, Inc.; Cinecom International Films; Cardinal Films; and Samuel Goldwyn Company.

allocate the commercial and art films to their respective theatres. Plaintiffs further allege that the distributors participated in this illegal allocation scheme to discriminate against The Movies in furtherance of the monopolies.

The pattern of film exhibition in Santa Cruz is indeed characterized by the Nickelodeon showing mostly "art" films and the UA predominantly commercial films. The significance of this pattern forms the basis of both plaintiff's uit and defendants' summary judgment motions.

II. DISCUSSION

The Court has before it summary judgment motions from the Nickelodeon, UA, Cinecom, and jointly, 17 of the Group I and II distributors.[2]

The Court will review each of the plaintiff's claims in light of the summary judgment attack to determine whether plaintiff has come forward "with specific facts showing that there is a genuine issue of material fact" to support the allegations of the complaint as to the various defendants. Rule 56(c); *Matsushita Electrical Industrial Co. v. Zenith Radio, et al.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986); *Celotex v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). There is no issue for trial unless there is sufficient evidence favoring the plaintiff for a jury to return a verdict for them. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505, 2516 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id., cites omitted.* Although in antitrust litigation, summary judgment is disfavored if extensive factual determinations must be made concerning intent and motive, *Betaseed, Inc. v. U & I Inc.*, 681 F.2d

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2. Kino Corporations is not a party to any of the case proceedings.

1203, 1207 (9th Cir. 1982), it is nevertheless "appropriate in the absence of any significant probative evidence tending to support the complaint." *Theee Movies of Tarzana v. Pacific Theatres*, 828 F.2d 1395 (9th Cir. 1987).

A. *Group Boycott in Violation of 15 U.S.C. § 1.*

The Movie alleges a 15 U.S.C. § 1 conspiracy in the unreasonable restraint of trade whereby the defendant exhibitors coerced and induced the defendant distributors to refuse to grant plaintiff licenses for first run commercial and art motion pictures. In effect, defendants as a group allegedly boycotted plaintiff with the purpose of eliminating it as a competitor and price cutter. The distributors allegedly refused to deal with plaintiff and exacted excessive terms for the movies it was allowed to license.

The allegations constitute non-price restraints of trade which are evaluated under the rule of reason. To establish a cause of action for an unreasonable restraint of trade under the rule of reason, the plaintiff must show (1) an agreement or conspiracy among two or more persons; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes antitrust injury. *Theee Movies of Tarzana v Pacific Theatres*, 828 F.2d 1395 (9th Cir. 1987).

Plaintiff fails to prove the first element of the § 1 restraint of trade allegation -- that defendants acted as part of a conspiracy or pursuant to an agreement and not independently. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984). Under § 1, "independent action is not proscribed." The distributors have "a right to deal, or refuse to deal, with whomever [they] like as long as they do so independently." *Id.* To establish a violation of § 1, plaintiff must "show an agreement between two or more distributors or distributors and exhibitors to exclude plaintiff from the market." *Dahl*

Inc. v. Roy Cooper Co., 448 F.2d 17 (9th Cir. 1971). In addition, plaintiff must show the agreement with evidence that the inference of conspiracy is reasonable in light of the competing inferences of independent action. *Matshushita*, 106 S.Ct. at 1357.

The underpinnings of plaintiff's evidence is the inference of a split the Court is expected to draw from the alleged historical pattern of movie exhibition in Santa Cruz. In addition, plaintiff argues that the defendant distributors' acquiescence in the defendant exhibitors' illegal scheme to split and monopolize the art and commercial market supplies the element of agreement and proves the conspiracy. *United States v. Paramount Pictures*, 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948). Accordingly, each film contract, between UA and a distributor and the Nickelodeon and a distributor, represents a meeting of minds to accomplish an unreasonable restraint of trade and therefore establishes a conspiracy for purposes of § 1 of the Act.

However, plaintiff fails to substantiate the allegations of a split or distributor acquiescence in refusing to license to The Movies with admissible evidence.

1. The Evidence of a Split Agreement

The plaintiff relies on the historical pattern of the Nickelodeon and UA's film exhibition to prove its allegations of a split agreement. Larry Snyder provides a definition of art and commercial films and then proceeds to denominate films which played at the UA and Nickelodeon screens as art or commercial. While the deposition testimony generally recognized that the Nickelodeon is known as an "art house" and the UA cinemas as commercial theatres, the mere fact that these exhibitors have played films consistent with their marketing strategy and philosophy does not constitute an unfair restraint of trade conspiracy. In addition, plaintiff's

booking agent, Carl Smiley, stated that he did not see a pattern which would lead him to believe that a split operated in Santa Cruz, and it was no longer reasonable to differentiate between "art" film and other product. Larry Snyder said in his deposition that the definition of an art film depended on each person and a film was art or commercial depending on where it played.

The alleged split is consistent with permissible and legal business activities. The Nickelodeon opened with the intent of showing specialized films and continues to do so, it competes for general theatre goers with UA and the other theatres in this manner. The permissible inferences to be drawn from plaintiff's ambiguous evidence of a pattern are limited under the antitrust laws. *Monsanto* held that conduct as consistent with permissible competition as with illegal conspiracy does not standing alone, support an inference of antitrust conspiracy." 465 U.S. at 764 (1984). The *Matsushita* Court noted that plaintiff had to present evidence "that tends to exclude the possibility that the alleged conspirators acted independently." 106 S. Ct. at 1357.

The only evidence submitted is inadmissible and contradicted hearsay from a third person, Mr. Al Charpiotti. The Court cannot consider this evidence under Rule 56(e).

Plaintiff does refer to an alleged split agreement that existed between UA and a previous competitor Kindair corporation in the 1970's. UA eventually bought out Kindair corporation before The Movie opened. Plaintiff has no standing to complain of this previous split which occurred before its entry onto the market and did not produce any antitrust injury to The Movie. *See Orion-Pictures v. Syufy Enterprises*, 829 F.2d 946 (9th Cir. 1987); *Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17 (1971).

2. Distributor acquiescence in the alleged split

Plaintiff next argues that the exhibitors coerced or induced the distributors into joining the split. The complaint alleges that "UA informed distributors that it would refrain from dealing with distributors that did not honor the split arrangement." Plaintiff intends to prove this charge with reference to the alleged split. Once again, the ambiguous pattern does not by itself prove a conspiracy or any illegal activity. Plaintiff admits that it "knows of no conversations in which UA threatened to refrain from dealing with any distributor who did not honor the split."

Plaintiff also claims that the distributors engaged in anticompetitive conduct with the exhibitor defendants which deprived plaintiff of first run film exhibitions. The allegedly anticompetitive conduct consisted of bid tipping, moveovers, adjustments to film rental, and sham bidding. Plaintiff claims in addition that the distributors rejected its superior bids when licensing to the UA and Nickelodeon.

a. Bid Tipping

Plaintiff relies on a deposition statement from Mr. Bill Raney that while involved in oral negotiations, not bidding, he had on a few occasions received information about competing offers. The Snyder's had likewise received information from a distributor of Mr. Raney's offers on a film. Distributors on occasion, it appears, provide information concerning offers they have already received in order to receive a higher offer from another exhibitor. These disclosures occurred in negotiations, not written bidding and appear to have favored plaintiff and competition, In addition, Mr. Raney declared that he had not received bid tipping from any of the individual defendant distributors. Without any further evidence of bid tipping on particular movies or which defendant distributors may have engaged in bid tipping, the

Court cannot find this conduct as evidence of a conspiracy among the various defendants to restrain trade.

b. Moveovers

The Movie complains of moveovers, the change of auditoriums, within or outside of the same complex without any time elapsing between runs while under the licensing agreement for the first screen.

Plaintiff cites *United States v. Paramount Pictures*, 334 U.S. 131 (1948) to suggest that moveovers are *per se* prohibited by the courts, yet he fails to account for the particular context of that ruling. The Court therein was condemning the nationwide monopolization of theatre exhibition and distribution. Distributors in that case were entering formula deals with a circuit of theatres that covered broad geographic areas. The circuit was allowed to allocate playing time and film rentals among the various theatres as it saw fit, effectively eliminating the opportunity for other theatre owners to bid for the feature in their respective areas at all. In the present case, any possible moveovers would have occurred only after the competitive bidding.

In any event, plaintiff once again fails to offer admissible and sufficient evidence that the distributors and exhibitors entered into an unlawful agreement to allow moveovers in a discriminatory fashion. The absence of firm evidence undermines plaintiff's allegations of moveovers being used to further an anticompetitive conspiracy.

c. Film Rental Adjustments

Plaintiff objects to the instances where distributors adjusted the terms of the defendant exhibitors film rental licenses if the film performed poorly at the box office. As the Court emphasized in *Dahl v. Roy Cooper*, readjustment is commonplace in the industry where the film has had a

disappointing run and a low gross profit." 448 F.2d at 20.

e. Rejection of Bids.

As an alternative method of proving distributor involvement in a split, plaintiff alleges that there was a systematic pattern of rejecting its superior offers made to the distributor defendants. Since a distributor may refuse to deal with anyone as long as it is not acting under an agreement or conspiracy, plaintiffs would have to show a consistent pattern of distributors refusing substantially superior bids to prove that an agreement existed in the absence of direct evidence of such an agreement.

However, defendants represented at hearing that deposition testimony of plaintiff's expert shows that there is no evidence of superior bids. Plaintiff did not contradict this declaration.

In addition, the distributors complain of receiving inferior bids from plaintiffs. For example, guarantees are especially important to convince distributors to license to new theatre houses which do not have grossing histories. Each company felt that the guarantees offered by the plaintiff were insubstantial, when they were made at all. The plaintiff's own booking agents responded in their depositions that they believed the guarantees to be insubstantial. Carl Smiley stated that Mr. Snyder would not follow his recommendations on guarantees, and did not bid as much as Smiley wanted him to, if he bid a guarantee at all. Howard Taormino, stated that he felt the guarantees were insufficient. In only 43 instances out of a total of 182 first run pictures on which the plaintiff expressed an interest during the damage period was any guarantee offered at all.

In addition, the evidence shows that The Movie did not even bid on all of the films it claims it could have acquired the licenses for during the damage period.

This case is much like plaintiffs similar and unsuccessful 1971 antitrust suit, *Dahl v. Roy Cooper*, wherein the circuit stated "we cannot escape the conviction that Dahl really is complaining that it was not apportioned film by the distributors free from the necessity of competing for it." 448 F.2d at 19.

In summary, plaintiffs have failed to provide the court with evidence of an agreement between any two or more of the defendants in support of its first claim for relief. The circumstantial evidence of a split, allegedly discriminatory business practices and a group boycott of The Movies does not go beyond general allegations.

Accordingly, since plaintiff has failed to set out evidence which raises a material issue of fact as to the conspiracy element of the § 1 claim, the Court HEREBY GRANTS all four summary judgment motions.

B. *Monopolization Under 15 U.S.C. § 2*

The Movie alleges UA attempted to monopolize, and monopolized the first run commercial film market, and the Nickelodeon attempted to monopolize, and monopolized the first run art film market in violation of 15 U.S.C. § 2. To support this claim, plaintiff realleges the same practices as in the § 1 claim and adds: defendants induced and obtained unreasonably lengthy play time rights; induced distributors not to place motion picture licenses up for bid and induced distributors not to open many first run pictures in Santa Cruz until weeks after the pictures break or national opening.

To establish monopolization under § 2 of the Sherman Act, The Movie must prove:

1) possession of monopoly power in the relevant market;

2) willful acquisition or maintenance of that power; and

3) causal 'antitrust' injury." *Syufy Enterprises v. American Multicinema, Inc.* 793 F.2d 990, 993 (9th Cir. 1986) citing *Transamerica Computer Co., Inc v. International Business Machines Corp.*, 698 F.2d 1377, 1382 (9th Cir.) *cert. denied*, 464 U.S. 955, 104 S. Ct. 370, 78 L. Ed. 2d 329 (1983).

The elements of the attempt to monopolize claim are:

1) specific intent to control prices or destroy competition;

2) predatory or anticompetitive conduct to accomplish the monopolization; and

3) dangerous probability of success; and

4) causal 'antitrust' injury. *Transamerica Computer* 698 F.2d at 1382.

Transamerica focused on the relationship between the second elements of the attempt and monopolization offenses. "Conduct that does not constitute 'willful acquisition or maintenance' of monopoly power cannot constitute the 'predatory or anticompetitive conduct' required to establish the offense of attempt to monopolize." *Id.*

The Court finds that the Movie failed to set forth facts to establish that UA's and the Nickelodeon's conduct was not lawful. Therefore, since plaintiff fails to establish the second element if either facet of the second claim for relief, summary judgment is HEREBY GRANTED as to that claim.

The Court does not now discuss whether plaintiff established that defendants exercised a monopoly over the

relevant sub markets as discussed in *Syufy*, op. cit. It is sufficient for the purposes of this motion to find that defendants' conduct was lawful.

Plaintiff failed to adduce evidence of its allegations of a split; the coercion of distributors not to license films to The Movies; the UA's abuse of its massive buying power by leveraging its power in one town to obtain a license in Santa Cruz; or the delay of showing films in Santa Cruz until some time after they had premiered nationally, and the bid tipping. Most of these elements were discussed above. The allegations of holding back films was disproved by evidence that films opened in Santa Cruz at the same time as they did in San Francisco. As to the allegations of UA's abuse of its buying power, Larry Snyder said that his evidence of UA's coercion came from what he read in trade magazines about UA's buying power and the fact that UA was always being sued. This is insufficient.

Finally, as discussed above, plaintiff has submitted no evidence that UA or the Nickelodeon coerced the distributors into denying film licenses to The Movies. The distributors apparently denied the licenses based on poor bids or perceived poor grossing potential of this new theatre.

The Movie also complains of advance advertising, moveovers, and adjustments. Adjustments clearly fall into the category of "ordinary business practices typical of those used in a competitive market" which do not constitute anticompetitive conduct. *Conoco, Inc. v. Inman Oil Co., Inc.* 774 F.2d 895, 905 (8th Cir. 1985); As discussed above, *Dahl v. Roy Cooper* recognized these adjustments as commonplace in the movie industry. Other districts have recognized moveovers as common practice as well. *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 886 n.7 (8th Cir. 1978) (There is nothing inherently illegal or

improper about moveovers); *Ayers v. Pastime Amusement Co.*, 283 F.Supp. 773, 789 (D.S.C. 1968) The question is whether the moveovers were actually used in a discriminatory fashion. As discussed above, plaintiff fails to point the Court to particular moveovers granted in a discriminatory fashion with resultant injury to plaintiff.

Finally, plaintiff complains that UA and the Nickelodeon advertised films before they received the license to show the movie. This advertising, they argue, evidences defendants confidence that they would receive the film. The question for the Court however, is whether the advertising was illegal or predatory. Plaintiff does not address this issue. While it may be questionable practice to advertise films for which you do not have the license, this alone does not constitute monopolization.

Because plaintiff has failed to support its allegations of unlawful conduct with evidence which could withstand the motion for summary judgment, the Court HEREBY GRANTS the motions for summary judgment as to the second claim for relief.

C. *Combination and Conspiracy to Monopolize 15 U.S.C. § 2.*

Plaintiff's § 2 conspiracy to monopolize claim mirrors the § 1 conspiracy claim. Plaintiff relies on the alleged pattern of movie exhibition in Santa Cruz, which, as discussed above, does not by itself prove a conspiracy. Summary judgment is HEREBY GRANTED as to the third claim for relief, conspiracy to monopolize in violation of 15 U.S.C. § 2.

D. *Pendent State Law Claims*

The Court hereby exercises its discretion to relinquish its jurisdiction of the pendent state claims of unlawful business practice and interference with prospective economic

advantage. The fourth and fifth claims for relief are HEREBY DISMISSED from this Court's jurisdiction.

IV. CONCLUSION

The Court HEREBY GRANTS the four motions for summary judgment as to the first, second and third claims for relief. In addition, the Court DISMISSES the pendent state law claims. Judgment shall be entered for defendants.

IT IS SO ORDERED

DATED: December 22, 1987